Dith v. City of Downey, No. 04-55863
[02/09/06 – Pasadena]

TROTT, Circuit Judge, concurring in part and dissenting in part:

I agree with my colleagues that the district court's grant of summary judgment in favor of the defendants on the Diths' probable cause claim was correct. I concur also with respect to their disposition of the Diths' "judicial deception" claim. However, I respectfully disagree with my colleagues' conclusion that the Diths' knock and announce claim presents a genuine issue of material fact that must go beyond summary judgment to a factfinder.

As explained by the Supreme Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) a dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. If not, the moving party is entitled to "judgment as a matter of law." Fed. R. Civ. P. § 56(c). The same rule holds true during the course of a trial by jury. If, after a "party has been fully heard on an issue and there is no reasonably sufficient evidentiary basis for a reasonable jury to find for that party on that issue," the court may determine that issue and grant a motion for judgment as a matter of law. Fed. R. Civ. P. § 50(a)(1). The purpose of summary judgment is to address these issues early so as to avoid unnecessary trials.

Here, the City of Downey called on the Diths on summary judgment to show

their cards on the knock and announce issue. The district court looked at the evidence and said, in effect, what you have is not enough for a reasonable jury to conclude that the police failed to discharge their knock and announce responsibilities before entering. I agree. The officers serving the warrant offered declarations to the effect that they knocked, announced their purpose, and received no response. All the Diths could offer was not that the police did not knock and announce, but that Mr. Dith did not hear what they said.

In his first declaration, Mr. Dith initially claimed that he "did not hear anyone announce themselves or demand entry." Later, in his deposition he stated that he "heard footsteps coming up the staircase" and that he heard male voices but could not understand what was being said. In his second declaration he stated that "I could hear someone knocking on my front door from my bedroom" and that "I could hear someone talking at the front door." Even Mr. Dith's first declaration does not contradict the declarations by law enforcement officials that they knocked and announced their presence before entering the premises, it only supports the conclusion that he did not hear what was being said. Mr. Dith's second declaration, albeit contradictory to his first, is a clear admission that law enforcement did knock and announce. Consequently, Mr. Dith's statements do not create a genuine issue of material fact: the evidence would not support a verdict in

the Diths' favor.

Ms. Martinez's statement that she "did not hear the police knock on the door before entering the apartment," nor did she "hear the police knock" or "say anything before going into the [Appellants'] apartment" but that she heard them say "Police" once they entered, does not advance the Diths' cause. Similar to Mr. Dith's first declaration, simply because Ms. Martinez could not hear anything from her vantage point is not a denial that the events took place.

The district court noted that the Martinez declaration "suggests that Ms. Martinez was too far from the front door to accurately witness the events" and seems implausible in light of Mr. Dith's admission that he heard the events. A review of the record shows that this conclusion was correct and undisputed. Indeed, Appellants have not presented any evidence contradicting the declaration of James M. Worford that Ms. Martinez physically could not have observed all that went on from the vantage point described in her affidavit.

Consequently, I would affirm the district court across the broad.